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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/935,064	08/21/2001	James Peter Herrick	88265-7079	7759

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EXAMINER	
BHAT, NINA NMN	

ART UNIT	PAPER NUMBER
1764	

DATE MAILED: 08/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/935,064	HERRICK ET AL.	
	Examiner	Art Unit	
	N. Bhat	1764	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *24 May 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *42-64* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *42-64* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. Applicant's election with traverse of the invention of Group II, claims 42-50 is acknowledged. The examiner further acknowledges newly submitted claims 51 to 64 and cancellation of claims 1-41 without prejudice applicant reserving the right to file for divisional applications. Applicant's arguments and amendments have been fully and carefully considered but are not persuasive for reasons of record in the office action of December 8, 2003 and the following:

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claims 42-50 remain and 51-64 are rejected under 35 U.S.C. 102(e) as being anticipated by Daravingas et al. [USP 6,222,320] for reasons of record in the office action and the following:

The layered yogurt is prepared to prevent bleeding and migration of colorants between layers and mixing upon handling. The yogurt product is provided in a container, which specifically provides portions of at least two visually distinct food components, which are refrigerated and non-thawed wherein, the components are viewable through the container. The yogurt

product of Daravingas et al. is an acidified dairy component, the yogurt includes a fruit based component, the yogurt product includes an arrangement wherein the layers are vertically stacked, or Neapolitan style or bull's eye style or barber poly style which reads on the limitation of the components being concentrically arranged in the container.

4. Applicant has argued that Daravingas is directed to an industrially manufactured mult-layered stirred yogurt product...Daravingas et al. include the use of multiple filling stations to fill the container with different colored yogurt. Applicant has argued that Daravingas does not teach a food product comprising on-demand dispensed portions of any food component. This may be true however, the recitations of "on demand dispensed portions" does not impart distinction between the layered product of Daravingas et al. The dispensing portions is an apparatus or a method limitations and carries not weight when examining a food product or composition, how something is dispensed to provide a composition does not preclude the layered composition product of the Daravingas et al. patent. Further, applicant has argued that new claim "56" which should be **54** requires that the food product having phase stability upon serving to an individual without require substantial amounts of stabilizers. The recitation of substantial amount stabilizers does not preclude the stabilizers present in Daravingas et al. because there is no range on how much stabilizer is used in the present invention, in other words, what is "substantial", the yogurt composition of Daravingas et al. includes stabilizing agents but it does preclude

"substantial amounts". It is maintained the Daravingas reference remains as an applicable reference against the food product.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 42-45, 48-50 and 51-64 rejected under 35 U.S.C. 103(a) as being unpatentable over EP 1 0404 759.

EP 1 040 759 teach providing a two-layered yogurt product in a container comprising a sauce on top of the yogurt. The boundary between the sauce and the yogurt is clearly distinguished as discussed in the abstract and Figure 2. Specifically, the two-layered yogurt is prepared by filling a container with a yogurt composition and then dispensing a sauce on top of the yogurt layer. The layers do not become turbid during the produce process or in storage and the sauce and yogurt do not mix during the distribution phase and during storage the layers

are clearly separate and visually distinct. [Note Page lines 39-58 and Page 4, lines 40 et seq.] The reference fully teaches a food product comprising a transparent container that contains at lest two visually distinct food components which are refrigerated and non-thawed wherein the components are viewable through container, the single serve portions included successive layers of the food components without apparent bleeding and that yogurt is an acidified dairy product and the sauce layer is a fruit based composition.

However, the container used in EP 1 040 759 is not transparent or translucent.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a two-layered yogurt packed in a container wherein the two layered yogurt has an upper layer comprising a sauce and a lower layer comprising the yogurt made from milk, wherein the boundary between the upper layer and lower layer does not bleed or mix. The layers are visually distinct. With respect to applicant's limitation that the food product containers an on-demand disposed portion of at least two visually distinct food product, this limitation carries little or no patentable weight when claiming a food product a layered food product having two visually distinct food components which are refrigerated and non-thawed wherein the components are capable of being viewable by providing a transparent or translucent container would have been obvious to one having ordinary skill in the art at the time the invention was made. A plastic container for individual serving has been taught by the prior to use a translucent or transparent container would have been obvious to one

having ordinary skill in the art the type of container used does not deter from a food product which is acidic which is spoon able which has two visually distinct food components wherein one of the layers is a fruit based component and wherein to the other layers is an acidified dairy component which exhibits no bleeding of the two layers thus the teachings of EP 1040759 renders applicant's invention as a whole obvious to one having ordinary skill in the art.

8. Applicant has argued that the '759 requires a fermentation step for the yogurt component of the product before filling the yogurt in the container or after the filling of the yogurt in the container and before adding the sauce layer and such fermentation steps are not relevant to the food product of the claims. Applicant is kindly reminded that the claims do not preclude the fermentation step and filling of the yogurt and sauce as taught in the '759 patent and for reasons delineated above the "on demand dispensing" is not a positive limitation which is appropriate in drafting a food product or composition. This limitation may be given patentable weight if drafted as a method or an apparatus limitation but does not preclude the reference as claimed.

9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL.** See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory

action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to N. Bhat whose telephone number is 571-272-1397. The examiner can normally be reached on Monday-Friday, 9:30AM-6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Glenn Caldarola can be reached on 571-272-1444. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

NINA BHAT
PRIMARY EXAMINER
GROUP ~~1300~~ 1764